No. 2885.

United States
Circuit Court of Appeals
For the Ninth Circuit

VINEYARD LAND & STOCK COMPANY, a Corporation, *Appellant,*

vs.

TWIN FALLS SALMON RIVER LAND & WATER COMPANY, a Corporation, and SALMON RIVER CANAL COMPANY, LIMITED, a Corporation, *Appellees.*

Brief of Appellees

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

RICHARDS & HAGA, and
J. L. EBERLE,
Solicitors for Appellees.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE 43828

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STATEMENT OF THE CASE.

The facts are stated with reasonable fullness in the brief of Appellant, and we shall do no more than direct attention to such matters as may serve to make clear the argument that follows:

The Issues.

Briefly stated, the case is one to determine the relative rights and priorities of the respective parties

to the use of the water of Salmon River, sometimes known as Salmon Creek.

Plaintiffs' Claims.

For convenience, we shall throughout the brief refer to the parties by the designation by which they were known in the trial Court, viz: Appellees will be referred to as "Plaintiffs," and Appellant will be referred to as "Defendant."

Plaintiffs claim under three water permits issued by the State Engineer of the State of Idaho. The validity of the permits is not questioned. They are for the following amounts and with the following priorities, to-wit:

(1) Permit No. 2659, for 1500 cubic feet per second, with a priority as of December 29, 1906.

(2) Permit No. 3267, for 500 cubic feet per second, with a priority as of August 22, 1907.

(3) Permit No. 5519, for 1000 cubic feet per second, with a priority as of September 7, 1909. (Record, pp. 270-284.)

The date of Plaintiffs' priorities or rights is therefore definitely fixed by the permits above referred to, and there is no controversy as to the date Plaintiffs' water rights were initiated. The works described in the permits have been fully completed and Certificates of Completion of Works have been issued by the State Engineer of the State of Idaho, as required by law. (Record, pp. 274 and 279.)

Plaintiffs' irrigation system was constructed under the Act of Congress commonly known as the

Carey Act and the laws of the State of Idaho passed in furtherance of the said Act of Congress, under a plan by which it was proposed to reclaim from such irrigation system approximately 150,000 acres; but as shown by the record, because of later information showing a limited water supply the system was reduced during construction so as to reclaim only approximately 100,000 acres, and water rights in the system were actually sold to only about 73,000 acres. Under the laws of Idaho, Plaintiffs, or the settlers who purchased the water rights, have ten years from the completion of the works in which to apply water to beneficial use. (Ses. Laws 1915, p. 216.)

Defendant's Claims.

The Defendant in its Amended Answer and Counter-claim (Record, pp. 34-51) pleaded no specific right, either as to date of priority or as to any particular ditch, or as to any particularly described lands, with the possible exception of what is known in the record as the Harrell, High Line, or Big Ditch, and as to that ditch both the priority of the right and the quantity claimed were indefinite and the lands were alleged as "located in more or less irregular shape in Townships 46 and 47 North, of Range 64 E. M. D. M., and in Townships 46 and 47 North of Range 65 E. M. D. M., in said Elko County, Nevada." As to other lands and rights, the defendant pleaded generally as follows (Par. 19, p. 45):

> "That along and upon said Salmon River and its tributaries, and within the watersheds of

such river, mostly in said Elko County, Nevada, and in irregular bodies, from the bulk of the land hereinbefore set forth, this defendant owns, and its predecessors owned for many years prior to the year 1906, and prior to the time of the alleged appropriation of the plaintiffs, about 18,000 acres of grazing and irrigable lands, susceptible to cultivation and the production of crops, wild and tame grasses, to-wit, about 13,500 acres thereof being immediately along and upon said river and its said tributaries and in Townships 43, 44 and 45 North of Range 63 E. M. D. M., in Townships 43, 44, 45, 46 and 47 North of Range 64 E. M. D. M., and Townships 43, 44, 45 and 47 North of Range 65 E. M. D. M., in the State of Nevada, and in Township 16 South of Range 17 East, B. M., in Twin Falls County, Idaho, and situate upon, along and adjacent to what are known as Nall, Jakes, Willow Springs, Warm Springs, Trout and Shoshone Creeks, and branches thereof, respectively, and said Salmon River."

It was then alleged that part of said lands had been irrigated by flooding and by sub-irrigation from the natural flow of the stream and part from dams and ditches and other means of "spreading, flooding and otherwise utilizing water upon said lands, and the remainder thereof by dams and ditches, wholly diverting the water of said stream to and upon such respective lands."

The testimony of defendant as to the lands actually irrigated by means of irrigation works and structures was equally indefinite and general.

Rights as Fixed by the Decree.

The decision of the Court is a remarkably accurate condensation of the evidence, and it gives a comprehensive view of the conditions existing under the projects of both the Plaintiffs and Defendant. The Court finds that it is unnecessary to determine the exact priority of the different ditches by which the Defendant is entitled to divert water from Salmon River, and that it is sufficient that it determines that the prior rights of defendant aggregate 12,500 acre feet. It also found that as to what is known as the Big Ditch, sometimes called the Harrell or High Line Canal, the work of construction had not been prosecuted with such diligence as to entitle the Defendant to the benefit of the doctrine of relation, and Defendant's water right, based on the extension of that ditch, the Court decreed to be subsequent to Plaintiff's rights. The Court therefore awarded Defendant a priority of 12,500 acre feet for certain lands which are described with some degree of accuracy in the decree. It then gave Plaintiffs 235,000 acre feet under their permits for the lands situated under their project, and then awarded the Defendant the third priority of 12,000 acre feet for the extension of the High Line or Harrell Canal, and the decree described with reasonable accuracy the lands to which such water may be applied. The description in the decree

of defendant's lands entitled to water is far more definite and specific than the description pleaded by the defendant in its answer and counter-claim.

The Court concluded its decision with this direction to Counsel (Record, p. 321):

> "Counsel for the Plaintiffs are directed to prepare a draft of decree and submit the same to opposing counsel before offering it for signature."

It will not be denied that this was done; neither will it be denied that the defendant declined to submit any suggestions, either as to the description of the lands to be included in the decree, or as to any other matter of which its counsel now complain.

ARGUMENT.

Plaintiffs' rights were initiated on December 29, 1906, at which time their predecessors in interest appropriated 1500 cubic feet per second for the irrigation of the lands lying under Plaintiffs' irrigation system. The rights of the parties must be determined as of that date; that is to say, any enlargements, extensions, or new construction made by the Defendant after Plaintiffs' rights were initiated must be included in the rights which have a subsequent priority to that held by Plaintiffs. An examination of the record will show that Defendant attempted to prove the conditions as they existed at the time of the trial, and the lands that were then being irrigated, instead of confining itself to the conditions

existing at the time Plaintiffs' rights were initiated.

The Supreme Court of Nevada, in Proctor vs. Jennings, 6 Nev. 83, said:

> "Priority of appropriation, where no other title exists, undoubtedly gives the better right. And the rights of all subsequent appropriators are subject to his who is first in time. But others coming on the stream subsequently may appropriate and acquire a right to the surplus or residuum, so the rights of each successive person appropriating water from a stream are subordinate to all those previously acquired, and the rights of each are to be determined by the condition of things at the time he makes his appropriation. *So far is this rule carried that those who were prior to him can in no way change or extend their use to his prejudice, but are limited to the rights enjoyed by them when he secured his.*" (Our italics.)

It is unnecessary to extend the citation of authorities on this subject. This is the law in the arid States, but as Defendant in this case rests its rights upon the laws of Nevada, it is sufficient to refer to the decision of the highest Court of that State on the subject.

It is conceded that Defendant's lands are what are generally known as mountain meadows, that is to say, they are natural meadows situated near the summit of the range; in this case, at an altitude of from 5400 to 5600 feet above sea level. A "meadow" is

defined in Webster's New International Dictionary as follows:

> "1. Grass land, esp. a field on which grass is grown for hay, often a tract of low or level land producing grass which is mown for hay.
>
> "2. Low land covered with coarse grass or rank herbage near rivers and in marshy places by the sea."

It is clear that a large part of these lands were never arid in the strict or true sense; only part of them were ever covered with sagebrush, and most of them were natural meadows, and on that account were originally sought by stockmen looking for native pasture, and this explains why the lands here in question have been claimed and held by different "cow outfits" since about 1871. The best description of the land before any artificial works had been constructed by man is given by the witness J. E. Bowers (Record, pp. 261-262), who testified as follows:

> "I have known the Salmon River since 1873. When I first saw it it was meadow land, grass land and willows, pretty much the same as it is now. I worked there until the fall of 1876 (meaning 1896) and have been through there off and on until 1903. I worked there as general manager of the outfit pretty nearly five years, until the winter of 1896. I hadn't been back there for eighteen years until last Sunday when I went up the valley and back again. There was no grain raised during my time on the Sal-

mon River. The strip of meadow land along the river when I first saw it would vary in width. It wasn't all solid meadow. The points would run down in it with brush or grease-wood, but I should judge the whole valley for fourteen miles from Bird's Nest to the mouth of Bore's Nest would average in the neighborhood of half a mile wide. This would be in 1893, '94, '95 and '96. In 1873 the conditions were a good deal the same, only the grass land was probably widened out by irrigation afterwards. Jasper Harrell was the owner in 1873. He brought some cattle in there and wintered them in the valley. I think he had come in from California two years before that with a bunch of cattle. There were some beaver dams in the river. Quite a few opposite the Bird's Nest and some in the upper end of the Vineyard field at the mouth of the canyon. The dams caused the water to spread out. The Salmon River for a good many years naturally flooded out and covered a good deal of this meadow land from overflowing, especially if there was a big run-off in May and the fore part of June."

The lands were valued in those early days because of the natural meadows and the pasture which they afforded during the winter. They certainly had no other advantages, for they are situated in a country with a cold and inhospitable climate, where frost may be expected nearly every month in the year and where no attempt has been made to raise grain until

the last few years. If it had not been for the grasses naturally growing thereon, the cattlemen would not have passed by the large and more accessible sage-brush plains with vastly more congenial climate.

The General Superintendent of the Defendant said (Record, p. 244):

> "We didn't raise anything but hay in 1910. We did clear a little brush below the lane for grain. In 1911 we sowed about twenty acres of grain there."

And Mr. Bower, a former Superintendent, said (p. 262): "There was no grain raised during my time on the Salmon River." Hugh McGuire, who had been connected with the Defendant's enterprise for several years, referring to the small piece of alfalfa which was the only tame grass or crop on the place, said (p. 165):

> "I think we commenced to irrigate the alfalfa about May; sometimes the frost set the alfalfa back. I have seen frost in the Salmon River country in June. It begins about September. I think on one occasion we had frost in July. At that time we had a snow storm in the whole country. I have seen snow in the latter part of September. A little garden was raised, and a few potatoes; not enough for the ranch."

In determining the amount of water to be allotted to Defendant the Court did, and necessarily should, take into consideration the natural conditions of the land, the annual rainfall, the altitude, its adapta-

bility to crops requiring a large amount of water, and the fact that natural meadow grasses grow on these lands without irrigation. We are not unmindful of the fact that several small tracts of bench land, originally covered with sagebrush, have been cleared and irrigated and Defendant has in that way added to the acreage included in the native meadows, and that between the sloughs or draws covered with natural meadow grasses and naturally flooded or sub-irrigated there are higher bars or stretches of land containing little or no pasture in their natural condition. Some of these tracts have lately been irrigated by ditches or large dams, while others, according to the great preponderance of the evidence in the record, have not been reclaimed but are substantially in the same condition today that they were forty years ago; and although it may appear from the maps that all lands between the ditches and the channel of the river have been reclaimed, or can be irrigated from such ditches, such, in fact, is not the case. While no contour survey of the land between the ditches and the river has ever been made, the witnesses for Plaintiffs had made a thorough investigation of all of these lands for the sole purpose of determining what lands had been irrigated, and they testified that there were large tracts of unirrigated sagebrush land between the ditches shown on Defendant's maps and the channel of the river.

We pass now to a consideration of the duty of water and the principles that should be observed in determining that question.

DUTY OF WATER.

In the State of Nevada beneficial use is the measure and the limit of the right, and the highest economic duty is demanded of water users.

The State of Nevada has from the beginning demanded that water users should at least approach the highest economic duty of water in their farm operations. It is apparent from the decisions of its Courts that the development of the State depends largely on the available water being economically applied.

The Supreme Court, in Barnes vs. Sabron, 10 Nev. 217, said:

> "In a dry and arid country like Nevada, where the rains are insufficient to moisten the earth and irrigation becomes necessary for the successful raising of crops, the rights of prior appropriators must be confined to a reasonable and necessary use. The agricultural resources of the State cannot be developed and our valley lands cannot be cultivated without the use of water from the streams to cause the earth to bring forth its precious fruits. No person can by virtue of a prior appropriation claim or hold any more water than is necessary for the purpose of the appropriation. Reason is the life of the law, and it would be unreasonable and unjust for any person to appropriate all the waters of a creek when it was not necessary to use the same for the purposes of his appropriation. * * * It must be exercised with reference to the gen-

eral condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual. * * * *

"We think the rule is well settled, upon reason and authority, that if the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person or persons may not only appropriate a part or the whole of the residue and acquire a right thereto as perfect as the first appropriator, but may also acquire a right to the quantity of water used by the first appropriator at such times as not needed or used by him. In other words, if plaintiff only appropriated the water during certain days in a week, or during a certain number of days in a month, then the Defendants would be entitled to its use in the other days of the week or the other days of the month."

The Court then discusses the delivery or use of water by periods and the right to confine the appropriator to the period that he has been accustomed to use the water, and adds:

"It was the duty of the defendants every fifteen days or thereabouts, as plaintiff might need the water, to turn down a sufficient quantity within plaintiff's appropriation required to irrigate his lands, provided always, that he was not by other means supplied with sufficient water for that purpose. * * * *"

In Dick v. Caldwell, 14 Nev. 167, the Court said:

> "He did not appropriate in a legal sense any water except such as he used beneficially. Turning water out of the stream for no useful purpose did not give him any additional rights. If he had from 1869 to and including 1875 turned 207 inches of water from the stream and made no use of any portion of it, it cannot be claimed that he would have been entitled to a decree for any amount by reason of actual appropriation. Turning more water from the stream than he used was *waste*, not appropriation."

In Roeder v. Stein, 42 Pac. 867, 868, the Supreme Court of Nevada said:

> "Possibly the appellant's counsel is of the belief that the plaintiff, having made the first appropriation, is entitled to have the water come down to him to the extent of his appropriation, whether he has use for it or not. If so, he is mistaken. Water is too precious in this arid climate to permit its being unnecessarily wasted. * * * * But, whatever he may be irrigating, he is only entitled to the amount he needs, economically and reasonably used, and when he has that he cannot prevent others from using the surplus. * * * Nor do we think that there was any error in requiring the plaintiff to use the water in a particular manner hereafter."

In Gotelli et al. vs. Cardelli et al., 69 Pac. 8, the Court said:

"The law is that an appropriator is only entitled to so much water, economically used, within his appropriation, as is necessary to irrigate his land. The necessary amount of water varies with the seasons."

The Federal Court, for the District of Nevada, in Union Mill & Min. Co. vs. Dangburg, 81 Fed. 73, said:

"Waste in the use of water is not permissible. To secure protection in the diversion and use of the waters of a stream for irrigation or any other purpose, there must be an economic, beneficial and reasonable use thereof so as to prevent waste. An excessive diversion of water for any purpose cannot be regarded as a diversion for a beneficial use. * * *

"The true test of the extent of an appropriator's right to the waters of a stream is the actual amount that is applied without waste to some beneficial use within a reasonable time after he has given notice of his intention to appropriate the water.

"An appropriator of the waters of a stream is required to make an economic use of the water appropriated for the purpose of the appropriation and if the capacity of his ditches is greater than is necessary to provide for such use, he should be confined to the amount necessary for such economic use though less than the capacity of his ditches."

In 1889 the Legislature of the State of Nevada passed an Act providing:

> "Any person or persons who shall during the irrigating season divert and conduct the water or portion thereof of any river, creek or stream into any slough or sloughs, dam or dams, pond or ponds and retain or cause the same to be held or retained therein without making any other use of such water, or who shall during the irrigating season divert and conduct the water or a portion thereof away from any such river, creek or stream and run or cause or allow the same to run to waste on sagebrush or greasewood land, such diversion shall be deemed an unlawful use and waste of water."

Sections 4674 and 4675 of the compiled statutes of 1911 provide as follows:

> "Section 4674: There is no absolute property in the waters of a natural water course or a natural lake. No right can be acquired to such waters, except a usufructuary right, the right to use it or dispose of its use for a beneficial purpose. When the necessity for the use of water does not exist, the right to divert it ceases and no person shall be permitted to divert or use the waters of a natural water course or lake except at such times as the water is required for a beneficial purpose."
>
> "Section 4675: No person shall be permitted to divert or use any more of the waters of a na-

tural water course or natural lake than sufficient when properly and economically used to answer the purpose for which the diversion is made, nor shall any person be permitted to waste any such water, and all surface water remaining after use, unavoidable wastage excepted, shall be returned to the channel by the persons diverting the same without unreasonable delay or detention."

By Section 4676 of the Compiled Statutes it is provided that the maximum quantity of water which may be appropriated where water cannot be beneficially used for more than six months is three acre feet. In some parts of the State it is provided that three acre feet is the maximum for five months, and one-half an acre foot may be added for each additional month that the irrigation season exceeds five months.

Section 11 of the new General Act relating to water rights, passed in 1913, provides as follows as to the maximum amount of water that may be appropriated for irrigation purposes (1913 Laws, Sec. 11, page 194):

"The maximum quantity of water which may hereafter be appropriated in this State for irrigation purposes shall be as follows: Where the water is diverted for direct irrigation, not to exceed one one-hundredth of one cubic foot per second for each acre of land irrigated; the measurement to be taken where the main ditch

> enters or becomes adjacent to the land to be irrigated; due allowance for losses to be made by the State Engineer in permitting additional water to be diverted into said ditch. Where water is stored, not to exceed four acre feet for each acre of land to be supplied; that is, four acre feet per acre stored in the reservoir, the losses of evaporation and transmission would be borne by the appropriator."

In view of the fact that substantially all of Defendant's lands are situated in the State of Nevada, it would seem unnecessary to cite authorities outside of that State on the question of the duty of water, except, possibly, in the State of Idaho, in which all of Plaintiffs' lands are situated, and a small part of Defendant's lands; and from the decisions in that State it appears that the two States are in perfect accord in demanding of water users the highest economic duty in the use of water.

The Supreme Court of Idaho, in Farmers Co-operative Ditch Company vs. Riverside Irrigation District et al., 16 Idaho 525, 102 Pac. 481, said:

> "It is the policy of the laws of this State, and it has been so declared from time to time by this Court, to require the highest and greatest possible duty from the water of the State in the interest of agriculture and other useful and beneficial purposes. * * *
>
> " 'The law only allows the appropriator the amount *actually* necessary for the useful or

beneficial purpose to which he applies it. The inquiry was therefore not what he had used, but how much was actually necessary. * * * '

" 'In this arid country the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home building.'

"After a somewhat extended and very careful examination of the record in this case, we are convinced that justice demands, and the record justifies, the granting of a new trial to the extent and for the purpose of determining the question as to the duty of water on the two classes of lands mentioned in this decree. *For this purpose the Court can hear the evidence of persons who are competent to testify on the subject and who can do so, not from guess work or hearsay, but from actual measurements and tests and applications of the water to the lands irrigated under these appropriations.* A new trial for this purpose can do no harm or injustice to anyone, and, on the other hand, if it should be found that even a very slight increase in the duty of water per acre can be had, it will, in the aggregate, amount to several thousand additional acres of land that may be irrigated.

"*In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. Economy must be required and demanded in the use and application of wa-*

ter. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their negligence or indolence in the preparation of their lands for the successful and economical application of water. One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor, simply because his land is inadequately prepared for the economical application of water." (Our italics.)

The case last above cited covers also the rights of a water user to continue a wasteful method of irrigation such as is used by the Defendant. The trial Court very properly held that turning water into the sagebrush without any systematic application of the water to the land, but with the sole expectation of stimulating in a slight degree the growing of natural grasses, was not the application of water to beneficial use within the meaning of the term "beneficial use" as that expression is employed in the Constitutions and Statutes of the arid States or the decisions of the Courts.

The Supreme Court of Nevada has conclusively settled that matter, so far as this case is concerned, by its decision in the case of Walsh v. Wallace, 26 Nev. 299, 67 Pac. 914. The Court there said:

"Cutting wild grass produced by the overflow of the river, or, as expressed by the witnesses, by the water of Reese River coming down and

> spreading over the land, was not an appropriation of that water, within the meaning of that term. Neither was the grazing of the land an appropriation of the water, under the facts."

If dams may be placed in a stream to raise the water above the banks and thus overflow the bottom lands, then all water laws and decisions of Courts may be set at nought, for manifestly no system of measurement can be installed in such cases, and no duty of water can be established where such methods are employed. Such use of the water hardly comes within the term "irrigation."

The Defendants have no vested right to continue the wasteful methods which they have employed in the past of damming the river and diverting the water into sloughs or low places where it is allowed to run continuously.

The Supreme Court of Oregon, in considering this identical question in Hough v. Porter, 52 Ore. . ., 98 Pac. 1083, 1102, said:

> "In this arid country such manner of use must necessarily be adopted as will insure the greatest duty possible for the quantity available. (Citing cases.) The wasteful method so common with early settlers can, under the light most favorable to their system of use, be deemed only a privilege permitted merely because it could be exercised without substantial injury to anyone; and no right to such methods of use was acquired thereby.

> "Owing to the little demand and large proportionate supply in use by those along Silver Creek and its branches in the early eighties, together with the lack of general knowledge and experience on the subject throughout the State, wasteful methods at that time were, no doubt, common; but of recent years improved means throughout the west have come into use, and a scarcity of the supply has made a more economic use necessary. The result is that the law has become well settled that beneficial use and needs of the appropriator, and not the capacity of the ditches or quantity first applied, is the measure and limit of the right of such appropriators."

The trial Court, from our viewpoint, went to the very limit in fixing a low duty of water, that is, in giving the Defendant a large amount of water for the small acreage on which Defendant had actually applied water to beneficial use. We think it is clear from the evidence that Defendant cannot beneficially apply three acre feet of water per acre on any of the bottom lands or natural meadow lands that it claims to have flooded or irrigated in the past. Courts, in determining the duty of water for irrigation, do not seek the point of "diminishing returns." No water suit has ever been determined on the basis of awarding to the claimant the *maximum* amount that can be applied to beneficial use, or the amount that can be used without decreasing the yield. Such a rule would wholly ignore the interest of the State and the

public and would not involve in any sense economic duty.

Plaintiffs' Exhibit No. 31 (Record, p. 286) shows the result at the Gooding Experiment Station at Gooding, Idaho, undoubtedly the nearest State or Government Experiment Station to these lands. Six plats were used, and various amounts of water were applied to the different plats. The amount of moisture in the soil at the beginning of the irrigation season and the amount at the close of the season are given, together with the yield per acre and the yield per acre foot of water.

Don Bark, a witness for Defendant, had participated in these experiments, and the bulletin had his approval. It appears from the bulletin that on plat 3 the percent of moisture in the ground at the beginning of the season was 17 (undoubtedly excessive in view of the amount of moisture in the adjacent plat); that by the aplpication of 1.95 acre feet the percent of moisture at the close of the season was 15%. That in plat 4 the percent of moisture at the beginning of the season was 13.74 per cent; that by the application of 2.6 acre feet there remained in the soil at the end of the season 17.12%, an increase of 3.38%. That in plat 5, by applying less than three acre feet during the season the percent of moisture increased from 13.39 to 16.92, over 3½%, thus showing conclusively that the continuous application of that amount of water would eventually waterlog the land. In other words, the amount of water applied was excessive, when considered in connection with the continuous use of the land.

These experiments were made in a section where the land is truly arid, and where no one would question but what more water would be required than on the lands of the Defendant. This table shows clearly that while for one or two seasons a large amount of water may produce slightly larger returns than a smaller amount, at the same time the land is gradually becoming waterlogged and ruined by the application of the larger amount.

These are elements that enter into the establishment of the economic duty of water, but which the trial Court largely ignored in awarding to the Defendant what we believe to be an excessive amount of water per acre, and the only redeeming feature, from our viewpoint, is that a very large percent of the water which Defendant is allowed to divert returns to the channel of the river above Plaintiffs' reservoir.

The only evidence in the record on the duty of water is that of Mr. Darlington and Mr. Robinson, competent engineers testifying for the Plaintiffs, and they testified as to the duty of water on Plaintiffs' project, where it must be conceded more water per acre is required in view of the longer irrigation season, the lower altitude, and smaller precipitation. These witnesses both testified that one and one-half acre feet per acre would be practicable on this project (Record, pp. 68, 90). The trial Court, however, construed the contracts between the Plaintiffs and the settlers to require the Plaintiffs to deliver two and three-fourths acre feet per acre, and, while we

think such construction is erroneous, the fact remains that Plaintiffs are entitled to sufficient water to reclaim all the lands under their system, or approximately 150,000 acres, if the water supply were sufficient for that purpose. Hence the duty of water under Plaintiffs' project is not important in this case. It is apparent that Plaintiffs will develop the highest practical duty to the end that their surplus storage and carrying capacity may be utilized, if possible.

The recent bulletin referred to in Defendant's brief has no bearing upon this case, for it is dealing with crops which are not grown, and cannot successfully be grown, on Defendant's lands, and the investigations were made under conditions totally dissimilar to the climatic and soil conditions obtaining on Defendant's lands. Besides, these experiments in no sense attempt to establish the economic duty, but rather the point of diminishing returns, without regard to the fact that if that amount of water should be annually applied the land would soon be ruined by over-irrigation, as shown by the table heretofore referred to (Record, p. 286).

We shall next consider the acreage for which Defendant is entitled to water.

Acreage for Which Defendant Is Entitled to Water.

The principal claim urged by Defendant on this appeal is that the Court erroneously determined the acreage for which Defendant was entitled to water and that the decree does not either correctly or speci-

ficilly describe the land on which Defendant is entitled to use the water awarded to it.

In justice to the trial Court, as well as the Plaintiffs, we are impelled to say that if the description of the lands which Defendant has irrigated in the past and for which it is entitled to a prior right is in any sense uncertain, indefinite or erroneous, Defendant can not escape its full share of the responsibility for the error. In the answer and counterclaim, the lands were only generally described and the testimony introduced on behalf of Defendant, we believe, impressed the Court, as it did others, as being highly inaccurate and too unreliable as a basis for an important decree, and we again call attention to the concluding paragraph of the Court's decision (Record, p. 321) that "counsel for Plaintiffs are directed to prepare a draft of decree and submit the same to opposing counsel before offering it for signature."

It will not be denied by counsel for Defendant that the proposed decree was submitted to them and that they were invited to offer suggestions to the Court before the decree was signed, and if this had been done, clerical errors and inaccuracies in descriptions could readily have been corrected, and Plaintiffs are more than willing to join in a request to the trial Court to correct clerical errors in description or otherwise that counsel can point out.

The Court very properly says in its decision (p. 315):

> "The evidence touching the acreage under irrigation is widely conflicting; and perhaps

that is to be expected where an appropriation is claimed for lands which were never cleared of the sagebrush or willows, and was never cultivated or cut over, but was used only for light pasturage."

The evidence, as stated before, is not only conflicting, but much of it seems largely conjectural and highly inaccurate. Even counsel for Defendant in their brief have been unable to harmonize their own figures. This is peculiarly a case where the findings of the trial Court on the facts ought not to be disturbed on appeal. All the evidence in this case was taken in open court; the trial judge had the advantage of seeing the witnesses and observing their manner of testifying, and many of them were examined at length by the trial judge on points that they had failed to make clear to him. He had the benefit of the explanation by the witnesses themselves of the maps and exhibits which they had prepared and which had been introduced in evidence, and it must be conceded by all that in cases of this character the trial Court has superior opportunities for determining the weight of the evidence and the credibility of the witnesses. We think this is well illustrated in the case of the two engineers who testified for Defendant and who had prepared elaborate maps purporting to show in great detail and with absolute accuracy the location of all ditches, dams, irrigation works and all tracts that were being irrigated.

Mr. E. C. McClellan, the principal witness for De-

fendant, testified that he had selected every acre of land owned by the defendant, with the exception of eighty acres on Big Goose Creek (p. 101). He introduces two maps (p. 102) marked Defendant's Exhibits No. 4 and No. 5, and he says:

> "I made the map marked for identification as Defendant's Exhibit No. 4 from a survey made by me in 1889; the lines on the exhibit are correctly placed from the survey and notes made by me at that time."

And again (p. 105) he says:

> "I made Defendant's Exhibit No. 5 from surveys made in October, 1889."

And throughout his testimony he refers repeatedly to his *surveys*, and a person listening to his testimony on direct examination was led to believe that he had presented most accurate data prepared from elaborate surveys. The maps were introduced in evidence and a large part of the record is devoted to the testimony of this witness based upon his maps and the "surveys" which he says he had made of the ditches, fields and lands of the defendant. On cross-examination he says (p. 133):

> "I actually surveyed the outer boundaries of the shaded portions shown on Defendant's Exhibit No. 5. The exhibit is drawn and prepared according to stations and lines as they were run by me at that time."

When his attention was called to the fact that no stations appeared on his maps, he says:

"I put no stations on my original maps, nor any courses or distances in my notes. In fact, my notes consist simply of a plat or series of plats in my notebook."

He was then asked to explain more in detail how he had made the surveys and how his maps had been prepared, and, after a number of gyrations, this witness finally made the astounding statement that in making his alleged "surveys," covering many miles of territory that it would have required a crew of surveyors weeks to properly make:

"*I was alone* and was engaged about *four days* in making those observations. The first sketch was made on the ground. The next I sketched out on a small scale or map the work I did each day. This map was larger than the map in my plat book and was left in camp. I used a *transit* in making my surveying and sketching my maps. I laid off my section lines and the quarter section lines, then sketched in from my plat book. *I stepped the distances from the section corners.* I was attempting to locate the lands that water was turned upon and was irrigated by the company, either by flooding or from water carried through ditches, sloughs and dams placed in the sloughs to spread the water over the ground. * * * * (p. 135). I made no distinctions on the map between the parts of the ranch that were never cut for hay and that where there were willows and other kinds of brush."

Why the witness was making these elaborate "surveys" in 1889 the record does not show. The witness sometimes testified that he was trying to locate the land that was irrigated and at other times that he was attempting to locate ditches, and when his attention was called to the fact that the date the ditches were constructed did not at all correspond with the date of his alleged survey, he found some other reason why he was thus occupied, (pp. 266 and 227) the witness says:

> "I located the ditch by simply noting the distance from the section line to the ditch at this point where it entered the field in the southwest corner. * * * I forget whether the ditch was there or not; I think the ditch was above the fence. I was merely locating partly the ditch and partly the field. It was really to locate the field and not the ditch, but it happened at one point that the ditch was inside the field and so in locating the irrigated land I actually located the ditch. My notes do not show the places where the ditch crosses the section line. * * * *I was alone when I stepped it and was carrying a transit to get the bearing.*"

We submit that the trial Court should not be criticised for not accepting unqualifiedly the testimony of this witness. The only other survey made by the Defendant of its ditches was made by a young engineer by the name of L. W. Beason. This witness produced an elaborate set of maps purporting to show the capacity and location of all ditches, dams

and the areas under them (Defendant's Exhibits 7, 11, 12, 13, 14 and 15). This witness shows (p. 193) that he was primarily concerned with finding the outer edges of Defendant's lands containing any evidence of grass being grown and having found these outer limits he proceeded to prepare maps purporting to show all the lands between such extreme limits as being irrigated, and he included in this acreage not only the channel of the river, but hundreds of acres of willows and brush. On page 194 he says:

> "I located the exterior edge of the grass line on both sides of the river and platted it on the map. Then I measured the area on the *map* with a planimeter. * * * * We didn't actually measure the width at any point. We located the outside edge of that pasture land and all along the river with reference to the government corners, platted it to scale and measured the area on the map in square inches * * * * and from that figured the acreage."

He then explains that they did not actually measure or chain distances, and adds regarding the method which he had followed (p. 195):

> "This method isn't strictly accurate; the degree of accuracy depends upon the number of times that you make observations."

He then admits that for long stretches the map that he had prepared shows irrigated land along the river where there are actually no irrigation works whatever. In one place he says (p. 195):

"It is about five miles from the dark green in section 11 to the head of that ditch. Throughout the entire distance there is not a single ditch or constructed irrigation works of any kind * * the strip referred to below the Vineyard Ranch is not entirely covered by willows. There are scattering willows along there. There are scattering willows and large bunches of willows all along the river. They are included in the pasture lands."

The witness then testifies how he had determined the capacity of the ditches and his evidence on that point was so remarkable that we think the Court very properly declined to place much confidence in the testimony of this witness either as to his surveys or the land that was being reclaimed. The witness says (p. 196):

"I didn't measure the area under the various ditches that I referred to, so I cannot give the number of acres under the several ditches. In determining the capacity of the ditches I measured from the highest point on the lower bank to the average bottom of the ditch. I found that the ditches had an uneven bottom. I run a profile, about a thousand feet along each ditch, and took the average grade. To get the cross-section I took the surveyor's level near the point of diversion in each case. The capacity of the ditch from the point of diversion to the first diversion out on the land is about the same in these sections. All those old ditches vary more or less

in cross-sections, and I took what I thought would give a fair capacity. The average grade and the smallest cross-section determines the capacity of the ditch. I took the smallest cross-section between the point of diversion and the first diversion onto the land. I didn't take any sections after any water had been turned out on the land."

The Court later examined the witness as follows:

"The Court:

"Q. You simply surveyed these lands in order to make these plats, you selected the outer edges of the tracts that grew grass or pasture, did you?

"A. Yes, sir.

"Q. Without any regard to whether or not it was irrigated?

"A. Yes.

"Q. You didn't make any examination to see whether it was irrigated or not? You simply took the place where grass was growing?

"A. Yes."

The record shows that the defendant attempted by glittering generalities and beautifully colored maps to impress on the Court that it had irrigated for many years immense tracts of land along the Salmon River. The evidence which it submitted, outside of that of the two engineers above referred to, was of the most general character and entirely insufficient as the basis for any definite decree.

The record shows that upon cross-examination Plaintiffs attempted in nearly every case to get an estimate from the witness as to the amount of hay that was cut, or the acreage that was cut over, or that was being irrigated, and the Defendant seemed equally anxious not to produce any specific or definite evidence on these points.

The witness, L. A. Nelson, testifying for Defendant, on cross-examination, said (p. 155):

> "In 1892 I think we put up 100 to 150 tons at the Middle Stacks. That was either in 1891 or 1892. I hardly think there was any put up at the Bore's Nest nor at the San Jacinto Ranch. I think there was more put up at the Vineyard. * * * * I couldn't tell exactly how much land we cut over at the Middle Stacks, we would just skip around here and there and pick out the best of it in spots."

Mark Conger, a witness for Defendant, says (p. 157):

> "I mowed the hay on the Hubbard Ranch and the Vineyard Ranch too. In 1901 to 1907 I should judge 200 or 300 tons was produced on the Hubbard Ranch and a similar amount on the Vineyard Ranch."

The witness Greathouse, testifying for Defendant about a large number of desert entries which he and other cowboys made and afterwards conveyed to the company, says (p. 178):

"We had to prove up on the land, and simply scattered the water to cover 320 acres. I was not raising any crop on any of it during the time I held it. Neither did Mr. Hewitt, Mr. Tesdell or Mr. Tinnin. Pretty nearly all of it was meadow land; part of it was covered with sagebrush. I did not clear the sagebrush. Tinnin's land was natural meadow and some sagebrush. No improvements were made, except what I have described, and it was used for pasture. It was substantially in the same condition when I left it as when I found it, except some ditches or some dams had been put in. It was something similar to the kind of land that I found on the Salmon River, Middle Stacks and Vineyard. It was farmed and used in about the same way. I cut no hay on the Shoshone Ranches or on the Big Creek Ranches. In 1887 we put up about 100 tons at the Middle Stacks. In 1887 at the Vineyard Ranch we cut all the hay above the ranch house, some from the ranch house up toward the Hubbard; I couldn't say just how many acres. I don't think it was 300 acres; possibly 200 acres, but I won't say. On Middle Stacks we cut considerable area. The hay was not so good and, of course, we cut a larger area in order to get more hay. * * * We picked out the best spots; some rye grass. They irrigated the land, but you might say didn't have any system."

It is singular, to say the least, that the Defendant did not produce a single officer, foreman or other witness to testify as to the acreage actually cut over or irrigated for hay. This suit was commenced in May, 1912 (p. 19), and the case was not tried until the spring of 1915, so there were three entire irrigation seasons or haying seasons to gather information on this point, but no one would testify either as to the acreage cut for hay or the number of tons produced, except as they were compelled on cross-examination to make estimates.

Mr. McClellan, the chief witness for Defendant, makes the following estimate as to the acreage cut over (p. 125):

> "As far as I can remember, there was no hay cut from there (Middle Stack field) until you get below the San Jacinto Ranch. My recollection is that there was some hay cut above and below the Bore's Nest house shown on Defendant's Exhibit 5 on both sides of the river."

As to the number of tons cut, he says (p. 127):

> "It would be a very poor estimate that I could give as to the number of tons of hay cut on the Salmon River ranches, but I should guess it from somewhere between 200 to 300 tons; it did not vary much from year to year."

And again:

> "I am reasonably certain that alfalfa was placed upon about 20 acres at San Jacinto in 1893. The crop was just ordinary; it might be

2 or 3 tons to the acre. I think this alfalfa is still there. * * * The alfalfa was on the bench land. This is the only crop of tame grass, except some at the Bridge Ranch. * * * Alfalfa was cut twice a year."

At another place this witness says (p. 135):

"In 1889 I don't think over 1000 acres had been cut for hay any season in both tracts. Fully that acreage has been cut over; not entirely on those lands, but on other lands placed under irrigation. The land that was cut over when I first knew the country is almost all used for hay land; some of it has grown up to willows, and they used it for pasturage. In 1904 there were 4000 or 5000 acres being cut over. They were cutting over land that had formerly been used for pasture and sagebrush that had never been irrigated. *When I saw the land in 1909 it was not in substantially the same condition as in 1904.* A great deal of brush had been cleared off and they had cut hay off of it. That was all up and down the valley from the Hubbard Ranch to the Bore's Nest. It appeared to me from just what I noticed in traveling down the valley that they had cleared off brush from all parts of it in different small pieces, say a few acres in one place and 15 or 20 acres in another, under works that had been constructed previously."

The conditions in 1909 could not, of course, have been considered by the Court, for Plaintiffs' rights

were initiated in December, 1906, but from this mass of conflicting evidence and unreliable estimates the trial Court had the burden of determining the acreage that had been irrigated for hay and the acreage that was irrigated for pasture prior to December, 1906.

William Yost, a witness for Plaintiff, testified in rebuttal that he had worked for the Defendant for six or seven years, commencing in 1896. The testimony of this witness is most interesting as it shows how much land a competent irrigator can irrigate under the system of irrigation used by the Defendant. He says:

> "My headquarters during the first three years was at the Vineyard and Hubbard. After that I was irrigating on the Salmon River from Bird's Nest to Bore's Nest; four or five years. I did not do all of the irrigating. I had one man most of the time; part of the time I did it alone. In the early part there were two of us in fixing up the dams; in the latter part I might be alone and was part of the time. From June until the first of July, only about a month, I was alone. The occasion for having a man with me in the spring was that we had to fix up the dams and heads of the ditches, etc. We generally called it about ten or twelve miles from the Bird's Nest to the Bore's Nest. We did whatever irrigation was done on both sides of the river between those points, or most of it. I did the mowing between the San Jacinto and Bore's Nest. Sometimes

there were two or three machines doing the mowing. We took something like 50 or 55 days to cover the land. I don't know about the time that I was alone or when there was two machines. I couldn't tell just the amount of days it would have taken one machine to cut over the lands that was cut for hay. I don't know that it would take quite a hundred, because I don't remember just what time there was two or three machines running. I don't believe a man can average over eight or ten acres a day with one machine. I don't believe that there is a great deal of difference in the area between the San Jacinto buildings to the Bore's Nest, or in hay there, than above the San Jacinto buildings. I think the largest acreage cut over is above the San Jacinto. I mean the Bird's Nest and Middle Stacks. The land we cut over was not taken in solid tracts. We just mowed the bottom lands, the best part of the hay. We didn't mow it all. The fields would be irregular."

It is shown by the testimony of others that from five to six weeks was usually consumed in cutting and putting up the hay. That one outfit took the Middle Stacks and Bird's Nest fields, another what is south from San Jacinto to Bore's Nest, and a third the Vineyard and Hubbard ranches. It appears, also, that they averaged less than two machines a day in each camp, and it is also clear that one mowing machine would not average more than about eight acres a day.

We think the above are the most accurate estimates that can be formed as to the acreage cut over, and when worked out it will demonstrate that the area cut over is considerable less than 3,000 acres, and this is borne out by the estimates of the amount of hay produced.

Mr. Workman, a witness on behalf of Plaintiffs, in rebuttal, testified that he had been foreman of the San Jacinto Ranch for nearly two years. He says (p. 260):

> "In 1911 and for some years prior to that, I seen no hay cut at the Bird's Nest. I was familiar with the ranch and noticed no hay being cut at the Bird's Nest from 1899 until 1912. I was on the river most every year during the summer time. Hay was cut at the Middle Stacks. The hay that was cut from the San Jacinto to the Bore's Nest was measured in 1911; I assisted in measuring it. My recollection is that there was somewhere between 400 and 500 tons. In that year hay was being cut on the San Jacinto Ranch only in the Middle Stacks, San Jacinto and Bore's Nest. This number of tons of hay includes just from San Jacinto down to Bore's Nest. My estimate would be that there was more hay cut there than at the Middle Stacks; not much more. There would be a little more than half, I would say, cut at the Middle Stacks than at San Jacinto to the Bore's Nest."

The only definite evidence on the acreage actually irrigated is that of Plaintiffs' witnesses Darlington and Stocking, who had made an accurate survey with a crew of surveyors, consuming about five weeks in doing so, of all the Salmon River ranches of the Defendant. They took the maps which they had prepared and the maps that had been prepared by Defendant and prepared a composite map showing the discrepancies between the two sets of maps. This composite map is known as Plaintiffs' Exhibit No. 33, and the condition of the land which had been included as irrigated land on the maps of Defendant, but which had been classed as non-irrigated land by Plaintiffs' engineers, is carefully described by both Mr. Darlington and Mr. Stocking in their testimony on rebuttal. Mr. Darlington's testimony commences on page 241 and Mr. Stocking's testimony commences on page 249 of the record. Mr. Darlington took a number of kodak pictures showing that much of these "pastures" or "meadows" is simply sagebrush land in its native condition. Mr. Stocking had charge of the surveying party and he testifies in great detail as to the condition of every piece or parcel which Plaintiffs had excluded as non-irrigated land, but which Defendant had included as land that was either cut over or used for pasturage.

We submit that an examination of the record will show that the testimony of Messrs. Darlington and Stocking, when read in connection with Plaintiffs' Exhibit No. 33 (the composite map), will show clearly that the Defendant was awarded water for a much

larger area than it had actually irrigated or reclaimed prior to 1907.

We pass next to a consideration of the priority of what is known as the Harrell or High Line Canal.

Priority of Harrell Ditch or High Line Canal.

The trial Court very properly held that Defendant had not complied with the statutes of Nevada in the construction of the Harrell Ditch so as to entitle it to the benefit of the doctrine of relation, or a priority as of the date when it filed its alleged water notice with the County Recorder of Elko County. Whether the Court unduly limited the effect of the notice which Defendant introduced in evidence is wholly immaterial as the evidence which followed conclusively showed that the Harrell ditch had not been constructed with such diligence as would entitle Defendant to claim a water right under the notice.

At the time Defendant made the alleged appropriation the laws of Nevada provided as follows, relative to the diligence required in order to obtain the benefit of the doctrine of relation where notices had been posted (Water Law 1889, Session Laws p. 51, Section 12):

> "That hereafter, every person, company or corporation constructing, enlarging or extending any ditch, canal or reservoir for beneficial purposes and intending to use or appropriate any water from any natural stream or lake within any water district for such beneficial purposes, shall file with the County Recorder of

the proper county before the commencement of the construction, enlargement or extension of such ditch, canal or reservoir, a statement showing the stream or streams, the point or place in said stream at or near which the water is to be taken out * * * * and likewise, of any and all enlargements thereof, and from the time of the filing of any such statement, water sufficient to fill such ditch or ditches and to subserve the use or uses aforesaid, if a lawful and just use, shall be deemed and adjudged appropriated. Provided, that nothing herein contained shall be permitted to interfere with a prior right to said water, or to any thereof, and provided further, that such person or persons, or corporation shall within sixty days next ensuing the filing of such statement, begin the actual construction of said ditch or ditches, *and shall prosecute the work of construction thereof diligently and continuously to its completion*, and provided further, that the beginning of all necessary surveys of such ditch or ditches shall be construed as the beginning of such work of construction." (Our italics.)

It will be noted that the Nevada Statute is substantially the same as the law that has obtained in the arid west from the time appropriations through the posting of notice was first recognized, and the controversy relative to Defendant's rights under its notice can be disposed of here by simply examining the evidence as to the diligence observed by the De-

fendant in the prosecution of the work of constructing the canal in question.

The words "diligently and continuously" as used in the statute, have been so frequently construed that we shall not encumber the brief by any lengthy citations of authorities on the point, and it is elementary law that no rights can be claimed under the notice unless the subsequent acts required by the statute have been fully complied with within the time and in the manner specified in the statute.

Wiel on Water Rights (3rd Ed.), Sec. 385.
Kinney on Irrigation and Water Rights (2nd Ed.), Sections 741 and 1118.
Ophir S. M. Co. vs. Carpenter, 4 Nev. 534.

Kinney on Irrigation, at Section 741, says:

> "Unreasonable delay in the final consummation of the right is always fatal as against the rights acquired by subsequent appropriators. This has been the rule from the first in all states and territories where the law of appropriation is in force."

In Section 1118, the same author says:

> "Water rights, ditches, canals and other works, together with the easements over the lands of others for the same, may be lost by forfeiture. * * * * Forfeiture is a punishment annexed by law to illegal acts or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein.
>
> "The element of intent, therefore, so neces-

sary in the case of an abandonment, is not a necessary element in the case of forfeiture. In fact, a forfeiture may be worked directly against the intent of the owner of the right to continue in the possession and use of the right. Therefore, forfeiture as applied to water rights and other rights in this connection is the penalty fixed by statute for the failure to do, or the unnecessary delay in doing, certain acts tending toward the consummation of a right within a specified time; or, after the consummation of the right, the failure to use the same for the period specified by the statute."

The leading case on the definition of diligence required in the construction of irrigation works is Ophir Silver Mining Company vs. Carpenter, 4 Nev. 534, and this was decided even before there was any statute in the State of Nevada requiring that such work should be constructed "diligently and continuously to completion." In that case, the delays were inconsequential as compared with the delays in the case at bar. The period during which it was claimed there had been no steady or continuous work was from 1858 to the fall of 1862, and during that period there was more or less work done every year. The Court refers to the fact that during 1860 only two men were engaged for a few days in cleaning out the ditch, and adds:

"The year 1861 is little less barren of results. A few men were employed for a period of three

months only, who, Rose says, were engaged in cleaning out and enlarging the ditch. From the fall of 1861 to the summer of 1862 nothing appears to have been done. In the summer from three to twenty men were employed and continued work for about five months. * * * Thus it appears that from the fall of 1859 to the summer of 1862, a period of over two years and a half, work was done upon the ditch for about three months only; that was during the year 1861, when Rose testifies that from seventeen to twenty men were employed. * * * *

"In our judgment, those facts exhibit an utter want of diligence in the prosecution of the design which it is claimed was undertaken by Rose. If the labor of twenty men for three or four months, in a period of two years and a half, constitutes diligence in the prosecution of such a vast enterprise as this, it is difficult, if not impossible, to designate the entire want of diligence. The manner in which this work was prosecuted certainly does not accord with what is generally understood to be reasonable diligence. Diligence is defined to be the 'steady application to business of any kind, constant effort to accomplish any undertaking.' The law does not require any unusual or extraordinary effort, but only that which is usual, ordinary, and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged

in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work itself. The law, then, required the grantors of the defendants to prosecute the work necessary to an execution of the design with all practical expedition."

Since the above decision was rendered, both the legislatures and the courts have become more exacting in the requirement of diligence on the part of appropriators of water, and in view of the above decision of the Supreme Court of Nevada, long before there was any statute on the subject, and in view of the settled law on the subject in other states that diligence in the construction of the works must be observed otherwise no benefit can be claimed under the notice, the trial Court could not do otherwise than disregard the notice under which Defendant claims a water right for its extension and enlargement of the Harrell Canal.

The diligence observed by Defendant and his predecessor in interest in the construction of this canal fails so utterly to come within the requirements of the law that we shall simply refer to the testimony submitted by Defendant itself.

Hugh McGuire, a witness for Defendant, on cross-examination, said (p. 162):

"The work on the Harrell Ditch I testified about was being done at times when we were not engaged in other work. I do not know of any work being done on it in 1905 or 1906. I wasn't there all the time. I am quite positive no work was done. The work was extending the Harrell Ditch from the lane to the old work. It took about two months. This was in 1901. The first extension after that was in 1904, when it was extended north across the lane about a quarter of a mile. This part, I think, was about 18 inches to 2 feet deep. That part wasn't used for irrigation that I know of while I was there. It was in that condition from 1904 to the end of 1906 when I left. The constructed part of the Harrell Ditch was not enlarged after I went there, but part of it was not finished in the bottom and I finished taking that out and increased its capacity. We would go from one ditch to another and repair and fix up the dams, and when there was nothing else to do would do some construction work. The lane I have referred to is the lane on the road from the Bridge Ranch, as you call it, to San Jacinto. * * * * I left the company in 1908."

Mr. Adam Patterson, apparently the managing agent of Defendant at the time it purchased the properties from the Sparks-Harrell Company, says (p. 166):

"I received the ranch for the Vineyard Company the first of November, 1908. I went out

on the properties first in August, 1908. When I had charge of the property we built the Harrell ditch from what is called the San Jacinto lane to a point north of there where the ditch makes a big bend. There had been a little work done at the San Jacinto lane, a distance of about 200 or 300 yards, I should judge. We made the extension in the latter part of May or the first of June, 1909. About a quarter to a half mile of ditch was constructed at that time with teams and scrapers. We had ten teams."

Mr. Beason, the present superintendent of Defendant, testifies as follows (p. 213):

"When I went on to the property in 1910 the big ditch wasn't finished. The upper end of it was used for irrigating the land above the lane. There was some work done on the big ditch in 1910, 1911 and 1912. It was finished to the present terminus of the ditch in 1912. The first year I was there the principal work on the ditch was from the lane up."

Even in the case of pioneer settlers, handicapped by poverty and lack of means, no Court has ever held that doing a little construction work now and then when they had nothing else to do, with periods of absolute cessation for a year or two or three at a time, constituted diligence or continuous work. When Plaintiffs commenced the construction on their project, there was an absolute cessation of work and had been for several years on the Harrell ditch. It

had been constructed about to the San Jacinto lane and to a small extent the upper part of the ditch had been used for irrigation. Plaintiffs had a right to assume that all rights under the alleged notice had been abandoned, except in so far as the ditch was then constructed, and when Defendant again commenced work in 1909 or 1910 to extend and enlarge this ditch it had notice that Plaintiffs were proceeding in good faith with the building of an immense irrigation enterprise, involving the expenditure of many millions of dollars, and including the construction of railroads and the building of towns and the reclamation of upwards of 150,000 acres, and that Plaintiffs were relying absolutely upon Defendant claiming only such water in the Salmon River as it had applied to a beneficial use.

It is useless for Defendant to urge that its large investment ought to be protected, for that investment was made after Plaintiffs' rights had been initiated and after Plaintiffs had expended in the development of its project probably a hundred times as much as Defendant expended in the enlargement and extension of the Harrell Canal. If the rights to the waters of Salmon River should be determined according to the expenditures that have been made in the building of irrigation projects and the reclamation of the desert and the development of the country, then we respectfully submit that Plaintiffs should have a far larger proportion of the waters of Salmon River than they received in this case.

RULINGS ON EVIDENCE.

The trial Court did not err in its rulings on the evidence offered by the Defendant.

The witness McClelland did not show that he was at all qualified to testify as an expert on the duty of water. The evidence which he had already given on related matters, together with his answers in the examination as to his qualifications made by the trial judge, as well as by counsel for Plaintiffs, show conclusively that he did not come within the rule entitling him to testify as an expert.

If any error was committed in the rulings on evidence, they were harmless, to say the least.

The Court Had Jurisdiction of the Parties and the Right to Make Provisions For Enforcing Its Decree.

The contention that the Court could make no provision for the enforcement of its decree needs no extended consideration in view of the numerous decisions determining water rights on inter-state streams. In this case the Court had jurisdiction of the person of the Defendant, and the fact that the land on which some of the water would be applied was situated in another State, does not prevent the Court from determining the case before it, where part of the stream or *res* is within the jurisdiction of the Court.

It is settled law that where jurisdiction of the person can be obtained, the Court has authority to determine the rights of all parties to the suit to the use of the waters of a stream.

Hoge vs. Eaton, 135 Fed. 411

The courts have repeatedly entertained jurisdiction and determined the rights to the use of water of inter-state streams.

Taylor v. Hulett, 15 Ida. 265; 97 Pac. 39; 19 L. R. A. (N. S.) 535.

Miller & Lux v. Rickey, 127 Fed. 573.

Rickey v. Miller & Lux, 152 Fed. 11, (C. C. A., 9th Circuit).

Willey v. Decker, 11 Wyo. 496; 100 Am. St. Rep. 939; 73 Pac. 210.

Morris v. Bean, 146 Fed. 425.

Bean v. Morris, 159 Fed. 651; 86 C. C. A. 519.

Anderson v. Bassman, 140 Fed. 22.

Rickey etc. Co. v. Miller & Lux, 218 U. S. 258.

Kansas v. Colorado, 206 U. S. 46; 51 L. Ed. 956; 46 L. Ed. 838.

1 Wiel on Water Rights in Western States (3rd Ed.), Sec. 340.

In the State of Nevada the doctrine of appropriation obtains and neither the State nor Defendant can therefore object to the Court determining the rights of the parties to this suit on that basis, although the parties may claim under the laws of different states.

The Court Did Not Err in Awarding Plaintiffs Rights Based Upon the Acreage for Which They Had Sold Water Rights.

Defendant can not complain because the Court based Plaintiffs' rights on the acreage for which they

had actually contracted to deliver water. If any error was committed in this regard, it was in the Court not giving to Plaintiffs the amount called for by their permits. The fact that Plaintiffs eventually can not hold more than they apply to a beneficial use is wholly immaterial.

The laws of the State of Idaho (Session Laws 1915, p. 216) provide:

> "That upon irrigation projects where the canals constructed cover an area of 25,000 acres or more, the license issued shall be issued to the persons, association, company or corporation owning the project, and final proof may be made by such owners for the benefit of the entire project, and it shall not be necessary to give a description of the land by legal subdivisions, but a general description of the entire area under the canal shall be sufficient, and water diverted and the water right acquired thereby shall relate to the entire project and the diversion of the water for the beneficial use under the project at any time within a period of ten (10) years shall be sufficient proof of beneficial use without regard as to whether each and every acre under the project is irrigated or not."

Under this statute, Plaintiffs were in fact entitled to have awarded to them the entire amount called for by their several permits. Should they fail to apply the water to a beneficial use within the time fixed by law, their rights would, of course, lapse as to the

water not so applied, but no provision in the decree is required for such contingencies; that is sufficiently cared for by the general law, which permits Defendant to use all the waters of the Salmon River not beneficially applied by others having prior rights thereto. The fact that an appropriator has his rights decreed by Court does not relieve him from the necessity of complying with the laws of the State as to the use to which the water must be applied in order to retain the right.

The Basis of the Court's Decree.

The Court arrived at its conclusion, as to the amount of water to which Defendant was entitled, by three different methods. It properly considered the Herrington report as it was undoubtedly the most reliable and dependable data before the Court on the amount of water which Defendant had used, and on the return flow, but it was not the only evidence on the question. A number of Defendant's witnesses showed that a large part of the water used upon the bottom lands returned to the channel of the river. It was also conceded that this was not true as to the bench lands, especially those under the Harrell or High Line canal, and the Court very properly provided that if Defendant desired to use the water on the bench lands under this canal it would be permitted to do so after showing the loss in the return flow that would result from such change of place of use, and upon making appropriate provision against loss to Plaintiffs from such change.

The decree in this respect is more liberal than is usual in decrees in water suits. It is the general rule to specifically describe the land to which the water may be applied and to permit no change, unless it can be shown that no injury will result to other appropriators. Whereas, in this case, the Court especially provided that, even though injury does result, the change will be permitted upon an allowance being made by the Defendant for the resulting injury to other appropriators.

Wherefore, we respectfully submit that the decree appealed from should be affirmed.

Respectfully,

RICHARDS & HAGA,

J. L. EBERLE,

Solicitors for Appellees,

Residence: Boise, Idaho.